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STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE
THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

May 16, 1996

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 - CC Docket 96-98

Dear Secretary Caton:

Enclosed are an original and 16 copies of the initial comments of the New York State Department of Public Service in the above-referenced proceeding.

Respectfully submitted,

Maureen O. Helmer /kap

Maureen O. Helmer
General Counsel

PBR:kk:96-98.cov

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

INITIAL COMMENTS OF THE NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE

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Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket No. 96-98

INTRODUCTION AND SUMMARY

The New York State Department of Public Service (NYDPS) submits these comments in response to the Federal Communications Commission's (Commission) Notice of Proposed Rulemaking (Notice) regarding implementation of the local competition provisions of the Telecommunications Act of 1996 (the Act).

The Act codifies, as national goals, what has been the continuing commitment of New York to the development of competitive telecommunications markets and the establishment of a competitively neutral approach to maintaining affordable service in this new market-driven environment. The task at hand, to open markets to competition as quickly as possible while preserving universal service, must be undertaken in the spirit of cooperative federalism if the ultimate beneficiaries of this Act, consumers, are to receive its intended benefits.

Ultimately, we envision fully competitive local exchange markets. Multiple carriers will provide a full and expanding range of services to meet the needs and desires of all types of telecommunications users. Consumers will shop among local service providers to find the package of capabilities, price, and quality that best meets their individual needs. They will be able to switch easily to a different service provider if dissatisfied with their current provider or tempted by a better deal. Under such an environment most, if not all, regulation of the local exchange market would be eliminated.

But, in order to get there, the state and federal governments must work together, and not in opposition, to develop policies which recognize that market flexibility is the key to achieving the vision of Congress. We are concerned that the NPRM takes a highly centralized interventionist view of how to accomplish the opening of local markets. Thus, we believe the Commission must reevaluate its tentative conclusion that its authority under §251 supersedes state authority under §251 and takes precedence over §§252 and 152(b) of the 1934 Act. Congress did not intend that the Commission's regulations would supersede state competition policies, including pricing policies. The plain language of the Act is not intended to transform states from independent sovereigns, as required by the Constitution, to little more than unfunded federal agents.

Instead, the Commission must make clear that its regulations apply only to states that do not act to open markets and to those areas in Section 251 which mandated specific Commission rules to be completed within six months, including number portability requirements, regulations for limitations on resale, minimum unbundling requirements, and rules for the administration of the North American Numbering Plan.

As a matter of policy, the Commission should recognize that the most effective rules to promote competition will evolve over time, and therefore it must recognize the importance of flexibility. As the Notice points out, there is a direct relationship between the policies adopted in this proceeding and the approaches taken in the Universal Service proceeding,[1] and therefore to the extent the Commission is required to develop regulations, these regulations should be kept to the minimum and should be simple and straightforward.

Furthermore, NYDPS submits that explicit rules promulgated at this juncture would likely fail to achieve their stated objective. Different carriers with varying network needs, architectures, and configurations may not be accommodated by specific rules. Instead, Commission policy should take the form of broad guidelines that would accommodate the progress states have already made in the development of competitive markets.

Pricing is the most difficult issue which must be resolved. In general, prices that enable a carrier to recover its forward-looking total costs would best support the development of competitive local exchange markets. However, it

[1] In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45.

is inappropriate for the Commission to attempt to "clarify" the Act's pricing standards by imposing uniform national pricing rules. Finally, the Commission may set minimum requirements for unbundled network elements and minimum interconnection standards.

I. The Tentative Conclusion that the Commission's Role Under §251 Supersedes State Authority Under §251 and Takes Precedence Over §252 and §152(b) Is Incorrect.

The Commission makes tentative conclusions that its authority under §251 supersedes §252:

> that Congress intended §§251 and 252 to apply to both interstate and intrastate aspects of interconnection, service and network elements, and thus that our regulations implementing these provisions apply to both aspects as well (NPRM ¶37).

The Commission then concludes that §2(b) of the 1934 Act does not require a contrary tentative conclusion. It tentatively concludes that:

> in enacting §251 after §2(b) and squarely addressing therein the issues before us, we believe Congress intended for §251 to take precedence over any contrary implications based on §2(b) (NPRM ¶39).[1]

Therefore, under this interpretation, Congress empowered the Commission with the duty to establish a competitive model for all 50 states, ranging from the terms and prices charged for

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[1] In fact, in ¶39 the Notice acknowledges that Sections 251 and 252 are not among the enumerated exceptions to Section 2(b).

competing local carrier access and interconnection, to substantial inputs to rates charged to consumers of local telephone service.[1] This "one size fits all" federal model transgresses the intent of Congress and would transform states from independent sovereigns, as envisioned by the Act itself and as required by the Tenth Amendment,[2] to little more than unfunded federal agents.

A. The FCC's Preemptive Power is Limited to the Activities Expressly Assigned to the Commission in §251

The Commission's authority to promulgate rules under §251 must be read in concert with all of Congress' purposes in enacting the 1996 Telecommunications Act. Rather than adopt a "one size fits all" approach to local competition, as suggested by the tentative conclusions, Congress carefully intended to

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[1] With this theory as the baseline, the notice addresses the policy choices the Commission should make, consistent with its jurisdictional approach to §§251 and 252. For all the reasons set forth in these comments we do not believe, as a matter of law, that the Commission has the authority under §251 to preempt state policy making as provided under §252 and §152(b) of the 1934 Act.

[2] The Act, as tentatively interpreted by the Commission, would unconstitutionally abridge states' sovereignty by precluding states from effectively regulating telecommunications solely within their borders. The Act also violates the Eleventh Amendment by requiring states to defend their actions under §252 in federal district court.

limit the Commission's incursion into an arena traditionally reserved to the states, specifically local telephone service.

The United States Supreme Court has consistently articulated a stringent legal standard for determining whether Congress intended preemption, and basic rules of statutory construction provide that, where possible, provisions of a statute should be read so as not to create a conflict. Washington Market Co. v Hoffman, 101 U.S. 112 (1879). For the reasons discussed below, the Commission's conclusion that its authority under §251 takes precedence over the states' authority under §251, §252 and §152(b) of the 1934 Act is legally incorrect.

First, the Act preserved §152(b) of the 1934 Communications Act which states that "nothing in this chapter shall be construed to apply or to give to the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communications services..." In the words of the United States Supreme Court, §152(b) "fences off from FCC reach or regulation intrastate matters -- indeed, including matters 'in connection with' intrastate service."

Louisiana Public Service Commission v. FCC, 476 U.S.355, 370 (1985).[1]

Second, §601(c)(1) of the Act provides further expression of congressional intent to narrow the Commission's reach by specifically providing that:

> This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Therefore, despite the tentative conclusion in the Notice suggesting otherwise, Congress intended for the Commission to assert its authority only in those instances in which it expressed a clear statement that the Commission preempt the states.

Third, the general rule of statutory construction that (1) preemption of state regulation is not to be implied; and (2) "expressio unius est exclusio alterius" dictate against the tentative conclusion. With regard to the first rule, state agencies have regulated all aspects of local telephone service since 1910. If Congress had intended to preempt such regulation,

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[1] The legislative history of the Act shows that in the final analysis Congress did not intend to diminish state authority under §152(b). Both H.R. 1555 and S. 652, as originally approved in their respective Houses, did provide for such revision. (See, S. 652 Rep. No. 104-230 at 78; and H.R. 1555 Rep. No. 104-204 at 53). However, the Act, as signed into law, preserves this state authority.

it would have so stated. See, Hillsborough County v. Automated Medical Laboratories, 471 U.S. 707, 715 (1985).

As to the rule that the expression of one excludes the other, Congress explicitly identified the instances when the FCC could preempt the states. Indeed, §251 of the Act provides explicit direction to the Commission to prescribe number portability requirements (§251(b)(2)); to prescribe regulations for limitations on resale (§251(c)(4)(b)); to determine what unbundled network element(s) should be available (§251(d)(2)); to establish a North American Numbering plan administrator and its cost recovery (§251(e)); and to do this within six months (§251(d)(1)).

Further, in other provisions of the Act, Congress explicitly provided the Commission with jurisdiction. For example, the Act provides the Commission with "exclusive" jurisdiction over the regulation of Direct Broadcast Satellite Service (§205(b)(v)). It even went so far as to explicitly direct that in certain instances states must act in a manner that is "not inconsistent" with the Commission's rules (§254(f)). It did not, however, endorse §251 rules that overrode either §152(b) protections or §252 Had Congress intended that the Commission's rulemaking authority under §251 supersede §§252 and 152(b), it would have included such preemption in the list of §251 rules to be adopted.

In contrast, §252 establishes specific requirements that the carriers and the states must follow. §252 envisions private parties negotiating access and interconnection agreements, and only if they cannot reach closure is the state commission required to step in to mediate and/or arbitrate the disagreements. Preemption is permitted only if "a state will not act" (§252(e)(5)). Moreover, if an aggrieved party believes a state fails to meet the Act's mandates, the remedy lies in federal court (§252(e)(6)), not at the Commission, as proposed in this rulemaking.[1]

Rather than being subject to preemption based on the exclusivity of the Commission's rules under §251, the states are specifically required to implement the pricing standards set out in §252. That incumbent local exchange carriers are directed to provide interconnection and unbundled access at rates that are just, reasonable, and nondiscriminatory in the same section as directions are given to the Commission does not give the Commission explicit authority to set intrastate pricing rules, as it proposes in the NPRM (¶¶117-20). These words are terms of art and do not act to confer federal jurisdiction over intrastate

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[1] The suggestion at ¶22 that "the §251 rules should help to give content and meaning to what state or local requirements the Commission 'shall preempt' as barriers to entry pursuant to §253" is at odds with §601(c)(1) prohibiting implied preemption, and the express authority of the states to set terms and conditions for new entrants (§253(b)).

rates. See, Pennzoil v. Federal Energy Regulatory Commission, 645 F.2d 360, 379 n. 37 (1981).

The plain language of the Act makes no reference to the Commission's authority over intrastate pricing. Neither §§251 nor 252(d) specifically require states to adopt Commission-dictated pricing rules. The opposite is true. Section 252(c)(2), Standards for Arbitration, requires the states only to consider "rates for interconnection, services or network elements according to subsection (d)" (emphasis added). Conspicuously absent is the requirement that states adopt pricing approaches consistent with the Commission rules under §251.[1] If Congress had intended to give the Commission authority over prices for intrastate "charges, classifications...", it would have said so. The plain language of the Act, and the weak rationale supporting the NPRM's tentative conclusion on national pricing rules, strongly suggest otherwise.

In summary, the tentative conclusion that Congress intended §§251 and 252 and the Commission's regulations to apply to both intrastate and interstate aspects of interconnection, service and network elements, including pricing, is incorrect. Instead, the intent and plain meaning of these sections confirm that Congress did not fundamentally alter the jurisdictional

[1] A negotiated outcome need not conform to the pricing standards at all (§252(e)).

responsibility for intrastate telecommunications, except in very limited circumstances.

B. Congress did not Mandate Uniform Rules Under the Act

1. Pricing

Even if the Courts ultimately determine that the Commission's authority is as expansive as suggested in the NPRM, there is no reason to conclude that Congress intended that prices be the same in New York City and in Circle, Alaska. The requirement that the Commission develop standards to guide the states in opening their local markets to competition does not compel the conclusion that all such actions be standardized. We do not believe that Congress intended the Commission to conclude that:

> Establishing national pricing principles would be likely to improve opportunities for local competition by reducing or eliminating inconsistent state regulatory requirements, thereby easing recordkeeping and other administrative burdens (NPRM ¶119).

Indeed, §252(e) provides that a state (or the Commission acting in its stead) may reject an agreement arrived at by negotiation only if it discriminates against a carrier not a party to the negotiations or is not consistent with the public interest. But the state has no authority to reject an agreement if its prices are inconsistent with those established as the national norm.

Therefore if Congress had intended uniformity, it would not have also allowed parties who successfully negotiate to adopt whatever pricing scheme they agree to.[1] Congress specifically sanctioned negotiated variations over national uniformity.

2. Access and Interconnection

The plain language of §251(d)(3), such phrases as "consistent with" and "does not substantially prevent implementation of," and the statutory scheme laid out under §252 belie the tentative conclusions that Congress intended uniform access and interconnection rules. (NPRM ¶¶50-67.) In fact, the opposite is correct. First, Congress crafted a framework for telecommunications competition that rests heavily on a careful balancing of incentives to the various industry participants to work out the details of interconnection themselves, with minimal regulatory involvement. In the first instance, most of the requirements aimed at opening the local exchange market are obligations imposed on the industry. Sections 251(a),(b), and

[1] Moreover, the Commission's alternative rationale for a national pricing scheme: "national pricing principles would be likely to increase the predictability of rates, and facilitate negotiation, arbitration and review of agreements between LECs and competitive providers..." (NPRM ¶119) is at odds with the timeframe laid out by Congress for the completion of negotiations. The August 8, 1996 date for the Commission to complete this rulemaking will more than likely occur after the first round of negotiated agreements have already been submitted to the state commissions for review and approval.

(c) of these requirements not only direct carriers to interconnect, but establish a process for doing so that contemplates the industry's resolving the technical and economic details through negotiation, rather than through regulation. Carriers may negotiate interconnection agreements without regard to even the Congressionally-mandated standards in §251 and §252, provided the negotiated agreements are not discriminatory and are consistent with the public interest, convenience, and necessity, as determined by state regulatory review.

Furthermore, §251(d)(3), Preservation of State Access Regulations, makes clear that state rules are to be preserved <u>unless</u> they are inconsistent with the requirements of the section and they substantially prevent implementation of the requirements of the section and the purpose of Part II.[1] This purpose, while dramatic in its effect, is to be accomplished by harmonizing federal/state roles, not by their strident disruption.[2]

In fact, as the NPRM ¶5 acknowledges, a significant number of states already have rules governing local competition, and competition for switched local service exists in several

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[1] Moreover, §252(e)(3) and §251(f) also suggest that the "one size fits all approach" is not consistent with the Act. These provisions allow each state to tailor their approach to rural competition and service quality, based upon local conditions.

[2] Sections 253(b), 261(b) and (c), and 601(c).

states. It was certainly not the intent of Congress to have states and competitors that had made progress in this area halt their efforts, nor for the Commission to implement a nationwide policy that could stall the competition that is already underway. Only in the event that competing carriers are unable to successfully negotiate mutual agreements did Congress provide for regulatory intervention, first from the states and, failing that, from the Commission.

Paragraph 157 of the Notice seeks examples of state policies that would be inconsistent with the Act. Since Congress intended to permit very limited intrusion on state sovereignty, the Commission's questioning of existing state policies is at best premature. For in fact, only if a state fails to act may the Commission intercede. The proper review for a state action claimed "inconsistent with the Act" is in federal court rather than at the Commission. (§252(e)(6)).[1]

Since the Notice raises the issue of New York's "pay-or-play" intercarrier compensation framework, we will respond.

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[1] Even if the Commission does have the authority to judge state policies, the courts continue to make clear that the Commission "has the burden, however, of showing with some specificity that such provisions would negate the federal policy..." <u>NARUC v. FCC</u>. 880 F.2d 422 at 430 (D.C. Cir. 1989). In this instance, unless a state indicates it has no intention of taking on its responsibilities under the Act, the Commission must wait until specific state policies are firmly in place before making any declarations that they violate the Act.

This pricing policy is consistent with the intent of Congress and the plain meaning of §§252(d)(2)(A)(ii) and 254(f) and 261(c).

a. <u>New York's Intercarrier Compensation Policy</u>

The pricing standard for transport and termination of traffic for purposes of compliance by an incumbent local exchange carrier with §251(b)(5) is set out in §252(d)(2). That section provides that a just and reasonable rate must provide for "reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier" and that such costs must be determined on the "basis of a reasonable approximation of the additional costs of terminating such calls."

New York has adopted a reciprocal pricing policy for the termination of calls by local exchange carriers on each others' networks which distinguishes between full-service local telephone service providers (those that serve residential, Lifeline and business customers) and selective local telephone service providers (those which service only niche markets). Often referred to as the "pay-or-play" (or "serve-or-pay") model, all local service providers are eligible to collect terminating access charges, but the rates are dependent upon the service they provide; full-service providers are entitled to a reduced charge to have their own intraLATA calls terminated by other telephone companies, while they may assess an undiscounted access termination charge on selective carriers. This intercarrier compensation pricing policy is fully consistent with both the Act and Congress' intent of promoting both residential and business competition in the local telecommunications market.

New York's "pay-or-play" intercarrier compensation plan does provide, as the Act requires, reciprocal compensation to all local exchange carriers for the termination of traffic on each network. The compensation varies depending on the service provided by each carrier, with selective carriers (who serve only niche markets and do not, therefore, provide universal service) paying higher access charges than full-service carriers (who serve residential, Lifeline, and business customers, and thus do provide universal service). Selective providers that do not provide the full range of local exchange services do not provide reciprocal access to a full-service provider, and thus do not qualify for the discounted rate. Further, nothing in the Act prohibits carriers from charging different rates for different services.

Moreover, this pricing scheme is fully consistent with the Universal Service provisions of the Act. Under §254(f), universal service requirements must not be discriminatory, and New York's pricing scheme furthers that goal. Charging the full interconnection rate (absent the discount) to full-service providers is tantamount to making the carrier pay a universal service component twice -- once in the original investment and once in the full interconnection rate. Thus, it would be discriminatory to provide the discount to niche carriers.

Consistent with the Act, interexchange carriers are not eligible for the discounted access rate. The §252 pricing standard, as described above, is intended to permit compliance by local exchange carriers with the requirement of §251(b)(3) to provide reciprocal compensation for the transport and termination of telecommunications. Local exchange carriers are, by definition (§153(44)), providers of either telephone exchange service or exchange access service. Interexchange carriers, which provide neither telephone exchange service nor exchange access service, are not eligible for the discounted terminating access rate. This is consistent both with the Act and with the Commission's tentative conclusion, with which we agree, that because interexchange carriers are not engaged in the provision of telephone exchange service or exchange access, there is no obligation to provide access to interexchange carriers pursuant to §251(c)(2). (¶161)

Finally, in §261(c), Congress made it clear that the states may impose requirements on telecommunications carriers for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access. New York's approach provides an incentive to carriers to compete with the incumbent carriers who are obligated to provide residential, Lifeline and business services.

II. As a Matter of Policy, the Commission Should Not Establish Uniform National Rules for Local Exchange Competition

Setting aside the issue of whether the Commission has the authority under the Act to establish national standards for interconnection, resale, and compensation, it would be inadvisable from a policy perspective to do so. The Commission itself recognized that there may be variations in technological, geographic, or demographic conditions in local markets, and that explicit national standards might limit the states' ability to address the policy concerns raised by these variations (NPRM ¶33). This assessment is correct. Should the Commission be required to act for a state under §252(e)(5), it should likewise consider these variations.

Explicit rules established now may fail to achieve their objectives as different carriers with varying network needs, architectures, and configurations may not be accommodated by a specific rule. What works for one carrier in one geographic area may not work for another, or for the same carrier in another area. The potential market participants include a wide array of possible entrants: interexchange carriers; wireless carriers; cable companies; competitive access providers; and electric utilities. The needs and target markets of such varied entrants will also likely be different. No single rule will encompass these variations unless it is broadly written and flexibly applied. When consideration is given to the pace of technological change in this industry, the inadequacy of specific rules becomes even more pronounced.

The Notice seeks comment on allowing the states to experiment with different pro-competitive policies if there is not sufficient evidence upon which to choose the optimal pro-competitive policy for the nation (NPRM ¶33). NYDPS submits that there is neither sufficient evidence upon which to choose nationwide rules nor any evidence that nationwide rules are necessary or desirable.[1] Regardless of whether the Commission ultimately adopts nationwide standards, the market would certainly benefit from allowing local competition to develop under the various states' existing frameworks.

In New York, for example, we have built upon the experience gained in the Rochester Telephone Corporation Open Market Plan in designing interconnection requirements for the rest of the state. We have retained certain aspects of the plan

[1] Except to the extent the Act explicitly mandates national rules (e.g., number portability and administration).

for statewide use, such as the interim number portability technology and funding mechanism, but have adopted different strategies for others such as the reciprocal compensation structure. In light of this experience, we have already found it necessary to re-examine certain aspects of the Open Market Plan, and it is our intention to revisit all of these issues at a future date when we have additional experience and data on competitive inroads. The Commission should not only limit itself to promulgating broad guidelines, but should revisit such guidelines periodically to ensure that they continue to meet the needs of the rapidly changing telecommunications market.

The Notice states that if the Commission were not to adopt explicit national interconnection rules, it would in effect be permitting states to set different priorities and timetables for requiring incumbents to offer interconnection and unbundled elements (NPRM ¶33). NYDPS disagrees. Section 251 of the Act requires incumbent LECs to provide interconnection and unbundled access to network elements. If the companies are not able to come to agreement on the terms of such interconnection and unbundling, any party to the negotiation may request that the state commissions mediate or arbitrate disputes. States that do not assume their responsibilities under §252 are subject to preemption by the Commission. Thus, neither states nor the incumbent LECs have the authority to set different priorities or timetables. In addition, the competitive checklist set forth in §271 requires that the RBOCs be providing or offering access and interconnection before they will be allowed to offer in-region interLATA service. No further incentive will be necessary for the RBOCs to provide interconnection on reasonable terms.

A. The Commission Should Not Set National Pricing Rules

In general, NYDPS believes that prices that enable the carrier to recover its forward-looking total costs of providing interconnections, transport and termination services, and unbundled network elements would best support the development of competitive local exchange markets and would be consistent with the pricing standards in the Act. As a policy matter, however, it is inappropriate for the Commission to attempt to "clarify" the Act's pricing standards by imposing uniform national pricing rules on the states.

It is clear that neither the Act nor the Commission contemplates establishment of uniform national prices for services and facilities carriers use to interconnect and provide local exchange services.[1] Nevertheless, the Commission sets

[1] Indeed, the Act provides carriers almost unlimited flexibility to negotiate mutually agreed upon prices that may vary from those that either state or federal regulators might deem ideal or even acceptable.

great store by the need to dictate uniform national cost standards or proxies to be used in determining what will be non-uniform prices. (NPRM ¶¶117-48)

The timeframes for rulemaking and arbitration established by the Act argue persuasively against the Commission's imposing uniform cost-based pricing rules. In New York, requests to negotiate (under §251) were filed as soon as the Act was signed into law. Requests for the NYPSC to arbitrate unresolved issues could come as early as mid-June and such issues must be resolved no later than November 8, 1996. The Commission must promulgate its rules in this proceeding by August 8, 1996, and it will be supremely challenged to meet that deadline. Thus, in the extreme, states could be forced to put requested arbitration on hold for almost two months awaiting Commission "guidance" and then have only three months for any required cost studies to be produced and reviewed and to approve the final product. It is simply inconceivable that any Commission-mandated cost analyses, even so-called "proxy models," could be usefully applied in this short timeframe.

Furthermore, the basic process of arbitration (the primary circumstance in which the Commission's proposed pricing guidelines or rules might have application) will not likely benefit from the existence of Commission rules. If and when arbitration is sought to resolve pricing disputes, it is likely